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Judgment--Decision for the Master as a Bar to Suit Against the Employee--Judgments of the Court of Claims as Res Adjudicata (Jones v. Young, 257 App. Div. 563 (3d Dep't 1939))

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JUDGMENT—DECISION FOR THE MASTER AS A BAR TO SUIT AGAINST THE EMPLOYEE—JUDGMENTS OF THE COURT OF CLAIMS AS RES ADJUDICATA.—This is an action for damages for injuries sustained by the plaintiff through the alleged negligence of the defendant, an employee of the state. Plaintiff had previously sued the state in the Court of Claims,[1] where judgment was rendered in favor of the state, on the grounds that the employee was not negligent and that the plaintiff was negligent. This was affirmed by the Appellate Division.[2] Subsequently, plaintiff brought this action in the Supreme Court, where the defendant-employee received judgment on the pleadings. On appeal to the Appellate Division, *held,* one judge dissenting, affirmed. A judgment of the Appellate Division, affirming a judgment of the Court of Claims, dismissing on the merits a motorist's claim for damages allegedly caused by a state employee's negligence, is *res adjudicata* and estops the motorist from maintaining a subsequent action against the state employee based on the same grounds of negligence. *Jones* v. *Young,* 257 App. Div. 563, 14 N. Y. S. (2d) 84 (3d Dept. 1939).

Under the doctrine of *res adjudicata,* an existing final judgment rendered by a court of competent jurisdiction upon the merits is conclusive as to the rights of the parties or their privies in all other actions on the points in issue.[3] Where the action against the master is purely derivative and dependent entirely upon the doctrine of *respondeat superior,* the master and servant are considered in privity. The master's liability in such an action is not that of a joint tort feasor, but is predicated only upon the negligence of the servant.[4] There is really only one action,[5] and the plaintiff, having elected to bring his action against the master alone, has had his day in court,[6] and cannot re-try the same issues, namely, the servant's negligence and his (plaintiff's) freedom from contributory negligence.[7]

In the instant case, the state and the defendant are in privity under a master and servant relationship,[8] and under similar circum-

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[1] Claim Number 24192.

[2] Jones v. State, 256 App. Div. 856, 8 N. Y. S. (2d) 774 (3d Dept. 1939).

[3] FREEMAN, JUDGMENTS (5th ed.) 1322. See Gugel v. Hiscox, 216 N. Y. 145, 110 N. E. 499 (1915); Cristopher v. Sisk, 133 Md. 51, 104 Atl. 355 (1918).

[4] Lasher v. McAdam, 125 Misc. 685, 211 N. Y. Supp. 395 (1925), *aff'd,* 217 App. Div. 718, 215 N. Y. Supp. 876 (4th Dept. 1926).

[5] Wolf v. Kenyon, 242 App. Div. 116, 273 N. Y. Supp. 170 (3d Dept. 1934).

[6] Featherstone v. Newburgh & C. Turnpike Road, 71 Hun 109, 24 N. Y. Supp. 603 (1893).

[7] Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423 (1914); Hein v. Sulsberger & Sons Co. of America, 175 App. Div. 465, 163 N. Y. Supp. 995 (4th Dept. 1916). See Jepson v. International R. R., 80 Misc. 247, 140 N. Y. Supp. 941 (1913), *aff'd,* 163 App. Div. 933, 147 N. Y. Supp. 1118 (4th Dept. 1914), *aff'd,* 220 N. Y. 731, 116 N. E. 1053 (1917); Chicago & R. I. R. R. v. Hutchins, 34 Ill. 108 (1863); Hardy v. Miller, 131 Kan. 65, 289 Pac. 952 (1930); Krolick v. Curry, 148 Mich. 214, 111 N. W. 761 (1907); Emery v. Fowler, 39 Me. 326 (1855).

[8] Jones v. State, 256 App. Div. 856, 8 N. Y. S. (2d) 774 (3d Dept. 1939).

stances, if the master were a private individual or corporation and had been sued in the Supreme Court, the plaintiff would be barred from maintaining this subsequent action against the employee.[9] Nor should there be a different result because the master here was the State of New York, and so could only be sued in the Court of Claims.

By constitutional provision the Legislature is authorized to create a court or board to hear and audit claims against the state.[10] A Court of Claims is provided for by statute,[11] and it has been made a court of record [12] with an official seal.[13] This court may promulgate, where necessary, its own rules and regulations as to practice before it, but it is provided that generally the practice should be the same as in the Supreme Court.[14] Determinations of the Court of Claims are made by judgment,[15] and a transcript of a judgment in favor of the state may be filed and docketed in the clerk's office in any county, and where so docketed it will be a lien on property of the claimant in that county to the same extent, and enforceable by execution in the same manner, as a judgment of the Supreme Court.[16] The judgments of the Court of Claims may be appealed by either party to the Appellate Division, generally under the same provisions of the Civil Practice Act as apply to appeals from the Supreme Court,[17] and a final determination against the claimant will forever bar any further claim or demand against the state arising out of the matters involved in the controversy.[18] The court has jurisdiction to hear and determine private claims against the state,[19] and by an amendment in 1936,[20] the state has waived its immunity, and has consented to have its liability for the damages due to injury to property or for personal injuries caused by the misfeasance or negligence of the officers and employees of the state while acting as such, determined by the Court of Claims in accordance with the same rules of law as apply in actions in the Supreme Court against private persons.

Thus, the Court of Claims is more than a mere auditing board,[21] and the final decisions of such board,[22] as well as the judgments of

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[9] See notes 3 to 7, *supra*.
[10] N. Y. CONST. art. VI, § 23.
[11] N. Y. COURT OF CLAIMS ACT § 2.
[12] N. Y. JUDICIARY LAW § 2.
[13] N. Y. COURT OF CLAIMS ACT § 9.
[14] N. Y. COURT OF CLAIMS ACT § 14.
[15] N. Y. COURT OF CLAIMS ACT § 25(1).
[16] N. Y. COURT OF CLAIMS ACT § 25(4).
[17] N. Y. COURT OF CLAIMS ACT § 29.
[18] N. Y. COURT OF CLAIMS ACT § 25(5).
[19] N. Y. COURT OF CLAIMS ACT § 12.
[20] N. Y. COURT OF CLAIMS ACT § 12a.
[21] See dissenting opinion of Justice Luce, instant case at 568, 14 N. Y. S. (2d) 87 (1939).
[22] Barber v. Town of New Scotland, 64 App. Div. 229, 71 N. Y. Supp. 1052 (3d Dept. 1901); Dufton v. Daniels, 190 Cal. 577, 213 Pac. 949 (1923); State v. Knudsten, 121 Neb. 270, 236 N. W. 696 (1931); Little v. Board of Adjustment of City of Raleigh, 195 N. C. 793, 143 S. E. 827 (1928); City of Socorro

the United States Court of Claims,[23] have been held to be *res adjudicata.* Therefore, we have a court of record, very similar to the Supreme Court, and an appellate court, both having jurisdiction over the action and acting judicially, rendering final decisions dismissing the claim on the merits, and fully and finally determining the identical issues that are again presented in this action. The plaintiff has had his opportunity to prove his contentions[24] and so, on principle and on precedent, should not be permitted to try the identical issues twice.

A. A.

MORTGAGE PARTICIPATION CERTIFICATES.—A guarantee company owned a $42,300 mortgage and sold participating certificates therein, amounting to $40,475 to third parties, guaranteeing payment of principal and interest. It repurchased one $100 certificate and at all times retained an interest of $1,825 in the mortgage. The company is now in liquidation and the plaintiff, as liquidator, seeks to determine whether he is entitled to share *pro rata* with the third parties, in the proceeds of the mortgaged property. *Held,* two judges dissenting, judgment in favor of plaintiff reversed. The guarantee company issuing the certificates is not entitled to participate in the proceeds of the mortgaged property until all other holders of similar certificates have been paid in full. *Pink* v. *Thomas,* 282 N. Y. 10, 24 N. E. (2d) 724 (1939).

The problem of the priority of rights in the distribution of the proceeds of guaranteed mortgage certificate issues of companies now in liquidation has arisen in numerous instances between the certificate holders and the company [1] and the instant case is another example of a situation where the company owns an equity represented by an unsold portion of the mortgage and by a repurchased certificate.

It is well settled that a mortgagee who assigns an interest in his mortgage does not, in the absence of an agreement to the contrary, postpone his interest to that of his assignee.[2] To establish priority

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v. Cook, 24 N. M. 202, 173 Pac. 682 (1918); State v. Howard, 83 Vt. 6, 74 Atl. 392 (1909); see FREEMAN, JUDGMENTS (5th ed.) §§ 633, 1258.

[23] United States v. O'Grady, 22 Wall. 641 (U. S. 1875).

[24] Nor can plaintiff's contention, that he has been deprived of a jury trial, be upheld. When a plaintiff has at his disposal two forms of actions or two tribunals in which to commence it, and he elects the one which does not permit him a jury trial, he is bound by his election and he is estopped from complaining about it later. See Di Menna v. Cooper & Evans Co., 220 N. Y. 391, 115 N. E. 993 (1917); *In re* Pickard, 140 Misc. 541, 250 N. Y. Supp. 738 (1931).

[1] N. Y. L. J., June 14, 1938, p. 2866, col. 1.

[2] Domeyer v. O'Connell, 364 Ill. 467, 477, 4 N. E. (2d) 830, 835 (1936); Mechanics Bank v. Bank of Niagara, 9 Wend. 410 (N. Y. 1832); Title Guarantee and Trust Co. v. Mortgage Commission, 273 N. Y. 415, 7 N. E. (2d) 841 (1937).